



FAIR POLITICAL PRACTICES COMMISSION

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December 11, 2000

Doyle A. Hanan, Ph.D.
P.O. Box 8914
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**Re: Your Request for Informal Advice
Our File No. I-00-209**

Dear Dr. Hanan:

This letter is in response to your request for informal assistance regarding the post-employment provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. After you leave your state position as a senior biologist supervisor with the Department of Fish and Game, may you represent, for compensation, a fish processor before the State Legislature, other agencies, and the Department of Fish and Game regarding legislation to govern the market squid fishery?
2. After you leave state service, may you collaborate with an employee of the Department of Fish and Game to apply to the federal government for grant monies?

CONCLUSIONS

1. **Permanent Ban:** After termination of your employment with the State of California, you may not, for compensation, represent, aid, advise, counsel, consult, or assist in representing a client before any court or state administrative agency in any proceeding where the State of California is a party or has a direct and substantial interest, and where the proceeding is one in which you participated during your tenure. Hearings before the State Legislature are not

¹ Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18109 - 18996, of the California Code of Regulations.

considered "proceedings" for purposes of the permanent ban. Therefore, you may represent a fish processor before the State Legislature provided that you will not violate the Act's one-year ban (mentioned below).

One-Year Ban: For a period of one year after leaving state service, you may not, for compensation, communicate with or appear before the Department of Fish and Game for the purpose of influencing administrative or legislative action or any of the actions identified in Section 87406(d)(1) (cited herein). The one-year ban does not prohibit you from making appearances before the State Legislature.

2. For a period of one year after leaving your state position, you may not work together with a Department of Fish and Game employee to apply for a grant from the federal government.

FACTS

You are a senior biologist supervisor for the Department of Fish and Game ("DFG"). At present time, you are on extended annual leave (using up acquired annual leave hours) leading to your retirement on December 30, 2000. You do not know whether you are a designated employee because some confusion exists over whether your position is designated in your agency's conflict of interest code. Nevertheless, your duties with DFG have included supervising the DFG market squid research program, performing the duties of contract manager for research contracts on squid with the University of California, advising DFG's director on interim management recommendations to the Fish and Game Commission, advising DFG's License and Revenue Branch on issuance of fishing permits, and starting the process for developing a market squid fishery management plan.

The budget, personnel, and other operations of the Fish and Game Commission are not subject to the direction and control of DFG. In fact, the Fish and Game Commission sets policy for this department.

After retiring from state service, you plan to apply for a federally funded Saltonstall-Kennedy grant in the area of fishery research and development. You are interested in collaborating with DFG staff so that the agency may be a co-applicant for this grant. In your current position, you are not currently working on obtaining these grant monies.

Recently, a fish processor found out that you were retiring and has contacted you to see if you would be able to represent him next year as a paid consultant before committees of the State Legislature regarding legislation to govern the market squid fishery. You are, therefore, requesting an interpretation of the Act's post-employment restrictions.

ANALYSIS

Public officials who leave state service are subject to two types of post-employment restrictions under the Act. The first is a permanent prohibition on advising or representing any person for compensation in any judicial or other proceeding in which the official participated while in state service. The second is a one-year ban on making any appearance before their former agency, for compensation, for the purpose of influencing any administrative, legislative or other specified actions.

1. Permanent Ban on "Switching Sides"

Section 87401 provides:

"No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated." (Section 87401.)

Section 87402 provides:

"No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401." (Section 87402.)

Sections 87401 and 87402 prohibit former state administrative officials, who participated in a judicial, quasi-judicial or other proceeding while employed by a state administrative agency,

from being paid to represent or assist in representing another person regarding that same proceeding. (*Grady* Advice Letter, No. I-99-034.)

The Act's permanent ban applies only to the representation of a client before a court or state administrative agency. "State administrative agency" means every state office, department, division, bureau, board, and commission, but does not include the State Legislature, the courts or any agency in the judicial branch of government. (Section 87400(a).) Under the permanent ban, hearings before the State Legislature are not considered "proceedings" for purposes of the permanent ban. (Sections 87400(a) and (c).) Consequently, the Act's permanent ban would not prohibit you from representing a client before the State Legislature provided that you will not violate the Act's one-year ban. Additionally, Sections 87401 and 87402 do not limit an official's ability to develop legislative proposals. (*Witherspoon* Advice Letter, No. A-94-371.)

Please note that the permanent ban applies throughout the entire duration of a proceeding. It would not, however, prohibit you from representing a client in any *new* proceeding even though the client may have been a party to a previous proceeding in which you participated as a state official. Additionally, the permanent ban covers only the proceedings of *state* administrative agencies; therefore, it does not generally prohibit you from representing a client before a city, county, or federal agency. (Section 87400(a).)

2. One-Year Ban

In addition to the permanent ban, the Act specifically provides that no designated employee of a state administrative agency:

"[F]or a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property." (Section 87406(d)(1).)

For purposes of this paragraph, an “appearance” before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Worker's Compensation Appeals Board. (*Ibid.*)

The prohibitions of Section 87406(d) apply to any employee of a state administrative agency who holds a position that is designated or should be designated in the agency's conflict of interest code. (Regulation 18746.1(a)(2).) As such, the one-year ban applies to employees who made or participated in the making of governmental decisions that had a reasonably foreseeable material effect on any financial interest. (*Pope Advice Letter, I-99-173.*)

You state there is some confusion within your agency about the proper designation of your position. You also state that your duties include advising DFG's director on interim management recommendations to the Fish and Game Commission and advising DFG's License and Revenue Branch on issuance of fishing permits. Under these facts, it appears that you participate in the making of governmental decisions in carrying out the responsibilities of your position. Therefore, for purposes of the one-year ban, we assume that your position should be designated in your agency's conflict of interest code if it has not already been included as a designated position.² Consequently, the one-year ban will apply to your position with DFG.

You have asked whether you may collaborate with an employee of DFG to apply to the federal government for grant monies. Regulation 18746.2 provides that an “appearance or communication” includes conversing by telephone or in person, corresponding with in writing or by electronic transmission, attending a meeting, and delivering or sending any communication. (Section 87406; Regulation 18746.2.) Therefore, working together with a DFG employee to apply for a grant would include engaging in these activities for the purpose of influencing administrative action and is prohibited for a period of one year after leaving your state position.³

Under the one-year ban, your former agency includes any state administrative agency you worked for or represented during the 12 month period before you left state service. Your former agency also includes any agency whose budget, personnel and other operations are subject to the direction and control of your former agency. (Regulation 18746.1(b)(6)(B).) Based on the facts which you have provided, your former agency is DFG. Because the budget, personnel, and other

² If you obtain facts from your agency indicating you are properly not designated in DFG's conflict of interest code, this conclusion may change.

³ Services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the prohibitions of the one-year ban, provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings; however, the prohibitions of the permanent ban may apply. (Regulation 18746.1(b)(5)(A).)

operations of the Fish and Game Commission are not subject to the direction and control of DFG, you are not considered a former employee of the Fish and Game Commission and are not subject to the one-year ban with respect to this commission.

Pursuant to section 87406, after leaving state service, you may not, for compensation and for a period of one year,⁴ appear before or otherwise represent any client before DFG for the purpose of influencing the actions specified in this statute since you will be a "former state administrative official" of DFG. Although the permanent ban, as discussed above, would not prohibit you from representing a client in a new proceeding before your former state agency, you will be prohibited from doing so for a period of one year after leaving state service under the one-year ban.

While the one year prohibition would place restrictions on your appearance before your former agency, it will not prohibit you from drafting proposals on a client's behalf to be submitted to these agencies. Similarly, it will not forbid you from using your expertise to advise clients on the procedural requirements, plans, or policies of your former agency. Please observe that, in either situation, you may not be identified in connection with your clients' efforts to influence your former agencies during the one year period in any way. Moreover, the permanent ban, as discussed earlier, may limit such activities depending on the specific proceeding.

You are also not restricted under Section 87406 from making appearances before the State Legislature. However, in carrying out your activities, you must take care not to violate the one-year ban with respect to any "appearance" before or "communication" with an employee of DFG.

3. Section 87407

Section 87407 of the Act provides that "no state administrative official...shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment." A person is a prospective employer of a public official if the official, either personally or through an agent, is negotiating or has an arrangement concerning prospective employment with that person. (Section 87407; Regulation 18747(c).)

⁴ The one year period commences when an employee has permanently left state service and is no longer receiving compensation, including compensation for unused vacation time. (Regulation 18746.1(b)(1); *Weil* Advice Letter, No. A- 97-247; *Negrete* Advice Letter, No. A-99-177.)

For purposes of Section 87407, “negotiating” and an “arrangement concerning prospective employment” are defined as follows:

“(1) A public official is ‘negotiating’ employment when he or she interviews or discusses an offer of employment with an employer or his or her agent.

(2) A public official has an ‘arrangement’ concerning prospective employment when he or she accepts an employer’s offer of employment.

(3) A public official is not ‘negotiating’ or does not have an ‘arrangement’ concerning prospective employment if he or she rejects or is rejected for employment.”

(Regulation 18747(c)(1) – (3).)

Under subsection (d) of this regulation, a governmental decision will directly relate to a prospective employer if the public official knows or has reason to know that the prospective employer is “directly involved” in the decision⁵ or that it is reasonably foreseeable that the financial effect of a decision on a prospective employer is material.⁶ Your request for advice does not indicate whether you are negotiating employment with a private employer or are merely considering doing so. Nevertheless, we feel you should be aware of the law in this regard and your obligations thereunder.


⁵ Regulation 18747 (enclosed) provides that the definition of the term “directly involved” is the one set forth in Regulation 18704.1(a). Regulation 18704.1 states that “a person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or by an agent: (1) initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or; (2) is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

⁶ The materiality standards of Regulations 18705.1(b), 18705.3(b)(2) and 18705.3(b)(3) are used in Regulation 18747. Please be aware that, at its December 8, 2000 meeting, the Commission approved draft regulations which revise the materiality standards for business entities. We anticipate these amendments to be effective in the first part of next year. Please check our website, www.fppc.ca.gov, for further information on the date these revised standards will be implemented.

We have enclosed the Commission document entitled "Leaving Your State Job? Post-Employment Restrictions May Affect You" to provide you with additional guidance. If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
Assistant General Counsel

By:  Natalie Bocanegra
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LM:NB:jg
Enclosures